No. 718

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In the Supreme Court of the United States

THE EAGLE-PICHER COMPANY, a Corporation,
Petitioner,

vs.

MYRA HAYNES, PEARL GARRETT, BEATRICE THOMPSON AND GLENN BARR, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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February, 1962.

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THE EAGLE-PICHER COMPANY, a Corporation,
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vs.

MYRA HAYNES, PEARL GARRETT, BEATRICE THOMPSON AND GLENN BARR, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

The Eagle-Picher Company, a corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on November 16, 1961, denying a petition for rehearing and affirming the Court's opinion entered on October 13, 1961.

Opinions Below.

No opinion was rendered by the district court but findings of fact and conclusions of law were made and entered which are set forth in Appendix A at pages 1A to 8A.

The opinion of the Court of Appeals is reported at 295 F. 2d 761 (1961) and is set forth in Appendix B at pages 9A to 18A.

Jurisdiction.

The opinion of the Court of Appeals was filed on October 13, 1961. On November 16, 1961, an order was entered denying a Petition for Rehearing. On November 27, 1961 the mandate of the Court of Appeals was issued.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Presented.

1. Whether or not the conventional words "mined or produced" as found in a mining lease were construed in accordance with Kansas law.

2. Whether or not a sub-lease containing reservations of interest to the sub-lessor became, by operation of Kansas law, an assignment contrary to the intent of the parties.

Statutes and Regulations Involved.

This case involves solely the application of the common law of Kansas to leases in use in the zinc and lead mining industry. No statutes or regulations are involved.

Statement.

The facts in this case are correctly set forth in detail in the District Court's Findings of Fact found in the Appendix hereto, Pages 1A to 8A. Briefly summarized these facts are as follows:

Plaintiffs (respondents herein) brought a suit for accounting under the terms of a mining lease and two mining sub-leases in which plaintiffs are the lessors and the defendant (petitioner herein) is a sub lessee.

The original or basic lease, executed in 1912, provides that the lessee should pay to lessors

> "A sum of money equal to five (5%) per cent of the market value at the place mined or produced of all oil, gas, asphaltum, lead, zinc and all other minerals or substances whatever which may be mined or removed by the lessee." (R. 7)

This lease covers Kansas land in the Tri-State Mining Field which is located in Kansas, Oklahoma and Missouri. Two of the plaintiffs live in Kansas and the defendant is a corporation organized under the laws of the State of Ohio. The amount in controversy exceeds $10,000.00 thus giving the Federal Court jurisdiction.

During the entire period of operation under the lease and sub-leases the defendant and others in the same district operating under similar leases have paid a royalty based on the open market value of the zinc concentrate mined from the premises so leased and sub-leased. There is contained in the zinc concentrate, zinc, sulphur, cadmium, germanium and other elements. Through subsequent additional processing by defendant and others some of these elements are recovered from the concentrate and sold. (R. 33-34, 89-90)

It was the contention of the plaintiffs that royalty should be paid on the value of the elements subsequently recovered and sold in addition to the royalty on the full

market value of the concentrate in which these elements were contained. (R. 90)

The defendant contended that there was no privity of contract between the plaintiffs and this defendant because the relationship was that of lessor and sub-lessee. Further the defendant contended that when it paid a royalty upon the open market price of the entire product produced from the premises (zinc concentrates) it had discharged its obligation to both its sub-lessor and that of the sub-lessor-lessee to the plaintiffs as lessors.

The District Court of Kansas concluded among other things that,

> "The plaintiffs have been paid all of the royalty due them pursuant to the terms of the mining lease." (App. 8A)

and that there was no privity of contract between plaintiffs and defendant because the relationship was that of lessor and sub-lessee. Thus judgment was entered for the defendant.

On appeal, the Court of Appeals for the Tenth Circuit reversed the judgment of the District Court of Kansas.

REASONS FOR GRANTING THE WRIT.

1. The proper interpretation of this mining lease and sub-lease is important, not only to the defendant, but in addition to the lead and zinc mining industry and other extractive industries.

The property here in question is located in the Tri-State Mining District, comprising corners of the States of Oklahoma, Kansas and Missouri.

It was stipulated that there were other mining leases in the area containing royalty provisions similar to the royalty provisions in the lease here in question. (R. 83)

The Court of Appeals in its opinion states the language in question is "rather conventional language."

The District Court of Kansas found and such finding is not challenged that,

> "* * * it was the uniform custom and practice in the Tri-State Mining District and the uniform custom and practice of the companies mining the property in question at all times, to conduct mining and milling operations in substantially the same manner and method as defendant to compute the market value at the place mined or produced of said lead, zinc and other minerals or substances in the same manner and based on the same market as has defendant, and to pay a royalty based upon the same method of computation as has defendant." (R. 35)

Thus a decision which reverses this uniform custom and practice and interpretation of conventional language in use in leases in the mining industry will have far reaching effect upon the entire industry.

After extensive hearings, Congress enacted in its last session a program to aid the lead and zinc mining industry entitled, "Lead and Zinc Stabilization Program", Pub. L. 87-347, Oct. 3, 1961, 75 Stat. 766, 30 U. S. C. 681-689.

The reasons for this legislation are set forth in detail in House Report 899 of the 87th Congress-First

Session, 1961. The following quotations are taken therefrom as set forth in U. S. Code Congressional and Administrative News 1961, beginning at page 4834.

"Need.

"* * * During the 85th and 86th Congresses the committee took considerable testimony from both industry and Government sources and concluded that the lead-zinc industry was seriously distressed, presenting a threat to the national interest.

* * * * * * *

"Testimony and evidence submitted to the committee, and extensive hearings held again this year on the bills introduced in the 87th Congress, showed without a doubt that, in the face of inaction to relieve the situation, conditions have been progressively deteriorating." (l. c. 4836)

"The tristate district, once the Nation's leading lead and zinc producing area, is now completely shut down. In a district which formerly employed thousands in its mines and in its mills, fewer than 100 men are employed today in maintenance, pumping, and fighting deterioration of the valuable mine properties. In the little mining town of Picher, Okla., more than 700 families are subsisting on surplus commodity foods, and Picher conditions are duplicated in a number of other communitities in the area." (l. c. 4837)

Thus we have here an industry which has been contributing substantially to the national interest which has been so adversely affected economically that Congress has taken remedial action. The mining property in question is only three miles from the town of Picher described above. It is obvious that a completely new and different interpretation of a conventional lease

clause which interpretation requires the industry to pay new and additional royalties, will further adversely affect this same industry. Thus the case is one of importance which this Court should review to determine whether or not the Court of Appeals has properly interpreted Kansas Law in reversing the District Court of Kansas.

2. The Court of Appeals has placed an entirely new and different interpretation on conventional language in use in the mining industry which is contrary to the common law of Kansas as interprted by the Supreme Court of Kansas and the Federal District Court of Kansas.

Any lease must be applied to a factual situation, therefore it will be necessary to briefly set forth the general facts in this case as found by the Trial Court.

From mining and milling operations on the land here in question and other lands in the Tri-State Mining District there are produced zinc concentrates. (R. 32-33, App. 3A)

Such concentrate is a crude conglomerate containing many elements, and not unlike crude oil except that it is a solid instead of a liquid. Contained in the zinc concentrate is zinc, sulphur, cadmium, germanium and other elements. (R. 33, App. 4A)

There is an open market in the Tri-State Mining District for these zinc concentrates. (R. 33, App. 4A). The Court of Appeals in its opinion makes the statement that,

> "The market value so attained was based entirely on the zinc and lead content of the concentrates * * *". (t. c. 764-765, App. 16A).

The Trial Court did not so find. While some purchasers were interested in recovering only zinc and lead values, other purchasers recovered additional values. It was stipulated in the Record that the concentrates were bought and sold on an open market. The very nature of the term market means that title to all of the elements of the concentrate were transferred at the time of sale.

Plaintiffs have been paid a royalty based upon the value of the zinc concentrate as determined by the open market price. (R. 33-34, App. 4A-5A)

The lease contains, what the Court of Appeals correctly states is, "rather conventional language" to the effect that a royalty shall be paid based on five per cent

> "of the market value at the place mined or produced of all oil, gas, asphaltum, lead, zinc and all other minerals or substances whatever, which may be mined or removed."

In its opinion the Court of Appeals stresses the word "produced" and concludes,

> "When further processing resulted in the saving of sulphur, cadmium and germanium from the residue of the concentrates, these minerals acquired a market value of their own. The conclusion must follow, we think, that having been 'produced' and having acquired an ascertainable value, the sulphur, cadmium and germanium were covered by the terms of the lease." (l. c. 765, App. 16A)

Thus the Court of Appeals has held that even though these elements were contained in the original concentrate and a royalty had been paid in full based

on an open market price of the original concentrate. when they are subsequently refined and separated, they are for the first time "produced" within the meaning of the term in this and other similar leases.

The results of such a holding are obvious, not only in the lead and zinc mining industry but in the oil industry and all other similar extractive industries. The possibilities of having to pay a royalty never cease. A royalty is first paid on the crude oil or zinc concentrate based upon the open market price. Thereafter and regardless of what expensive processing may be necessary, royalties must be paid as long as any additional element is separated by any amount of processing from the original crude oil or concentrate or any residue resulting therefrom.

The land in question lies in Kansas. The leases in question were executed and delivered in Kansas. Therefore it would seem that the leases should be interpreted according to the law of Kansas.

Erie Railroad Co. v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. ed. 1188 (1938);

Rosenthal v. *New York Life Ins. Co.*, 304 U. S. 263, 58 S. Ct. 874, 82 L. ed. 1330 (1938);

New York Life Ins. Co. v. *Jackson*, 304 U. S. 261, 58 S. Ct. 871, 82 L. ed. 1329 (1938);

West v. *A. T. & T. Co.*, 311 U. S. 223, 61 S. Ct. 179, 85 L. ed. 139 (1940);

28 U. S. C. 1652.

The closest Kansas cases that we have been able to find on this point are *Voshell* v. *I. T. I. O. Co.*, (1933) 137 Kan. 160, 19 P. 2d 456 and *Scott* v. *Steinberger*, (1923)

113 Kan. 67, 213 Pac. 646. In these two cases the Supreme Court of Kansas was interpreting an oil lease. The producer was not able to find a market at the place produced for the crude oil and thereafter shipped it to a more distant market. From the gross price received for the crude oil at the distant market, the producer deducted the cost of shipment of the oil and paid a royalty on the resulting net value.

In the *Scott* case, a unanimouus Court held:

> "We think the parties contemplated and the provision should be construed that gas, if produced, should be measured and the price determined at the place where the wells were connected with pipe lines, *and not at some distant market that might be found at the end of a pipe line remote from the field and where the cost of transportation might equal or exceed the value of the gas produced.*" (l. c. Kan. Pac. 647) (Emphasis supplied)

In the *Voshell* case, it was held that the lessor was entitled to a fractional share of the gross selling price minus transportation costs.

Although these two cases were cited in defendant's brief and no cases were cited in opposition thereto, the Court of Appeals does not discuss them nor cite any Kansas cases supporting its new and different interpretation.

It is further submitted that the Court of Appeals should have given great weight to the opinion of the District Court of Kansas as interpretative of Kansas law. Particularly is this true where no Kansas authority is cited to support the reversal of a decision by the District Court of Kansas which decision approved a

uniform interpretation of conventional language in use in the mining industry.

Bernhardt v. *Polygraphic Co.*, 350 U. S. 198, 204, 76 S. Ct. 273, 277, 100 L. ed. 199 (1955);

Gardner v. *State of N. J.*, 329 U. S. 565, 575, 67 S. Ct. 467, 472, 91 L. ed. 504, reh. den. 330 U. S. 853, 67 S. Ct. 768, 91 L. ed. 1296 (1947);

Reitz v. *Mealey*, 314 U. S. 33, 62 S. Ct. 24, 86 L. ed. 21 (1941);

Village of Brooten v. *Cudahy Packing Co.*, 291 F. 2d 284 (8 Cir. 1961) and cases cited therein;

Rudd-Melikian, Inc., v. *Merritt*, 282 F. 2d 924, 929, (6 Cir. 1960) and cases therein cited;

Central Electric v. *City of Stromsburg*, 289 F. 2d 217 (8 Cir. 1961).

Cases interpreting leases from jurisdictions other than Kansas are as follows:

Danciger Oil & Refineries, Inc., v. *Hamill Drilling Co.*, 171 S. W. 2d 321 (1943 Tex.), was a suit by Hamill for an accounting and resulted in a judgment for the defendant, Danciger. Hamill had assigned his interest in the lease, but retained the following interests:

> " " " said assignor hereby retains as a part of the consideration of this assignment and shall be entitled to receive one-twenty-fourth (1 24th) of all the oil, gas, casinghead gas, and other minerals produced, saved and marketed at the prevailing market price paid by major companies in the Gulf Coastal area from the properties above described free and clear from all operating expenses, if, as and when produced, saved and marketed " " "

At the time of the assignment, the wells produced "sweet gas" for which there was no market. Danciger

through a subsidiary erected an expensive distillation plant at which the crude gas was separated into gasoline, gas-oil, distillate, kerosene, butane, propane and residue gas. The plaintiff claimed he was entitled to 1/24th of the gross proceeds of all products. Defendant maintained that plaintiff was entitled to 1/24th of crude gas, as produced. The defendant prevailed.

Kretni Development Co. v. *Consolidated Oil Corp.*, 74 F. 2d 497 (10th Cir., 1934), involved a lease which used the following language:

> "* * * One-eighth part of the oil or gas produced and saved from said premises or the proceeds derived from the sale of said one-eighth part of said oil or gas."

In this case a pipeline was construed and the gas was sold to Midwest Refining Company for 4¢ at the wellhead. Gasoline was extracted from the gas by the refining company. The lessor sought to recover one-eighth of the proceeds of sale of the gasoline. The Court held for the defendant, lessee saying that lessor had no right to the profits on the gasoline. The court felt that the sale was complete when the gas was delivered to the refining company at the wellhead.

It is respectfully submitted that the "rather conventional language" here under interpretation has been interpreted by the Court of Appeals contrary to the customary interpretation of this language in the mining industry for over 40 years, contrary to the interpretation by the District Court of Kansas and contrary to the interpretation of it which the Supreme Court of Kansas might reasonably be expected to make.

Such a completely new interpretation will cause serious economic disturbance, not only to this defendant, but to an industry already suffering adversity and which has been relying and acting upon the opposite interpretation throughout its history.

3. The Court of Appeals held that two sub-leases were, by operation of law, assignments, contrary to the stipulation of the parties, the decision of the District Court and probably contrary to the common law of Kansas.

The opinion of the Court of Appeals states:

> "The instruments relating to the divisible portions of the quarter section here in question were for primary terms expiring prior to that of the original lease and reversionary interests were retained by the lessee-transferor. The primary terms of these instruments therefore conveyed sub-leasehold estates." (l. c. 763-764, App. 13A-14A)

This statement accurately sets forth the nature of the two instruments in question. But the Court of Appeals then goes on to state, in substance, that since the lease and sub-leases had been continued beyond their primary terms by the existence of production at the end of the primary term thus,

> "The contingent reversionary interests which had been retained by the lessee *were thereby extinguished* and, from and after that time, the transferees of the lessee held the entire remaining interest of the lessee under the terms of the original lease, *i. e.*, an estate whose duration was so long as minerals in paying quantities could be recovered." l. c. 764, App. 14A) (Emphasis supplied)

Thus, by operation of law, the Court of Appeals has wiped out the interest of the lessee-sub-lessor and all others similarly situated. In so doing the Court does not discuss the following interests or rights which the lessee-sub-lessor, by the documents in question, clearly attempted to retain and reserve unto himself.

First and most important is a substantial royalty which until now has been paid at each accounting period to the lessee-sub-lessor.

In *D. A. C. Uranium Co.* v. *Benton*, (D. C. Colo., 1956) 149 F. Supp. 667, the Court held that the reservation of an overriding royalty alone was sufficient to make the instrument a sub-lease rather than an assignment. Also see *Campbell* v. *American Limestone Co.*, (D. C. Tenn., 1951) 109 F. Supp. 741, affirmed (6 Cir.) 201 F. 2d 670, where the facts are very similar to the case at bar.

Second, the lessee-sub-lessor retained a substantial control of the mining operations to be conducted by his sub-lessee. If these restrictions were violated, the lessee-sub-lessor had the right of re-entry.

In *Lebel* v. *Backman*, (Mass. 1961) 175 N. E. 2d 362, this right of re-entry was stressed, the Court stating:

> "If the smallest reversionary interest is retained the tenant takes as sub-lessee, and not as assignee. *Dunlap* v. *Bullard*, 131 Mass. 161, 163; *Essex Lunch Inc.*, v. *Boston Lunch Co.*, 229 Mass 557, 559, 118 N. E. 899." (l. c. N. E. 365)

Third, the lessee-sub-lessor retained a right of re-entry at all times to remove personal property accruing to his sole benefit (chats and tailing). Further he

had a right to all excess water. None of which belonged to the lessor.

Fourth, the lessee-sub-lessor had the right to take his royalty in kind, and not in money. A right which the lessor did not have.

Fifth, the original parties to the sub-leases labeled them leases and clearly did not intend that they should be assignments. So clear is the language that counsel for plaintiffs in the District Court of Kansas stipulated that the documents were sub-leases.

In *Coles Trading Co.* v. *Spiegel*, (9 Cir., 1951) 187 F. 2d 984, the Court states:

> "It is the duty of the Court to give to the contract the effect intended by the parties who made it, as far as this may be done. * * * It follows that the contractual instrument between the parties was not intended as an assignment but as a sublease." (l. c. 987)

On the general subject of the difference between a sub-lease and an assignment see:

Waller v. *Comm'r*, (5 Cir. 1930) 40 F. 2d 892, cert. den. *Waller* v. *Burnet*, 282 U. S. 889, 51 S. Ct. 101, 75 L. ed. 784;

May v. *Walters*, (1960) 67 N. M. 297, 354 P. 2d 1114, p. 1117;

Bowlby-Harman Lbr. Co. v. *Commodore Services Inc.*, (W. Va. 1959) 107 S. E. 2d 602, p. 606;

Amco Trust Co. v. *Naylor*, (Tex. 1958), 317 S. W. 2d 47, p. 50;

18 Cal. L. Rev. 1;

8 Ind. L. Jour. 359.

We have found no case in any court in the United States converting a sub-lease, by operation of law, into an assignment where any substantial part of the following elements admittedly exist:

1. The primary term of the sub-lease differs from the basic lease.
2. The lessee-sub-lessor retains and reserves an overriding royalty.
3. The lessee-sub-lessor retains control over the operations of the sub-lessee.
4. The lessee-sub-lessor retains a right to enter and remove his property from time to time.
5. The lessee-sub-lessor may take his royalty in kind.

Unfortunately we have found no specific Kansas cases. But this is an even greater reason why the Court of Appeals should have followed the District Court of Kansas. Neither appellant nor the Court of Appeals cite a single case to support the reversal of the District Court of Kansas. The stipulated elements cited above are not even discussed.

This being true, under authority of the cases cited on page 11, *supra*, it is submitted that the Court of Appeals should have affirmed the decision of the federal district court sitting in Kansas.

If the intent of the parties is to be disregarded and new law written on the question of mining subleases, it should be done by Kansas authority.

For the above reasons the decision of the District Court, that the documents in question are subleases and that there is no privity of contract between

plaintiffs and defendant, should be affirmed. Defendant should not be required to account to the plaintiffs on a contract to which defendant is not a party.

CONCLUSION.

The Court of Appeals has,

1. given a new and different interpretation to conventional language in a mining lease which will require additional royalties to be paid by the mining industry,

and

2. converted a mining sub-lease into an assignment by operation of law.

Both holdings are contrary to,

1. the interpretation of the documents by the parties and others in the mining industry,

and

2. the decision of the district court sitting in Kansas which decision should be given great weight.

The first holding would seem to be contrary to two specific Kansas cases and the common law in other states.

The second holding is contrary to the common law in other states and hence probably contrary to the common law of Kansas.

The result of the reversal of the decision by the District Court of Kansas will be that the lead and zinc mining industry already in great economic distress will,

1. be required to pay additional royalties to land owners thus increasing its economic distress,

and

2. documents, long considered to be sub-leases by the industry, now become assignments thus creating new and different legal relationships and uncertainty.

For these reasons it is respectfully requested that a Writ of Certiorari be granted.

Respectfully submitted,

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February, 1962.

APPENDIX

APPENDIX A.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

No. FS-167

Myra Haynes, Pearl Garrett, Beatrice Thompson and Glenn Barr, Plaintiffs,

vs.

The Eagle-Picher Company, a Corporation, Defendant.

FINDINGS OF FACT.

1. On July 5, 1912, Mrs. Hannah Bower and Henry Bower, her husband, executed a mining lease to O. M. Youse, covering the

> Southwest Quarter (SW 1/4) of Section Seven (7), Township Thirty-Five (35), Range Twenty-Four (24) East in Cherokee County, Kansas.

This Mining lease provided, among other things that the leasee should pay to the lessors,

> "a sum of money equal to Five (5) Per centum of the market value at the place mined or produced of all oil, gas, asphaltum, lead, zinc and all other minerals or substances whatever which may be mined or removed by the lessee."

2. On March 30, 1918, the successors in title to O. M. Youse, lessee, sub-leased the

> Southwest Quarter (SW 1/4) of the Southwest Quarter (SW 1/4) and the South Half (S 1/2) of the Northwest Quarter (NW 1/4) of the Southwest Quarter (SW 1/4) of Section (7), Township Thirty-five (35), Range Twenty-four (24).

to the Vinegar Hill Zinc Company with a royalty provision as follows:

> "All checks, drafts, cash, or other credits for ores or other minerals sold from this land shall be made payable to the order of the party of the first part or its duly authorized agent, who shall at once on the receipt thereof (and Collections duly made on said checks and other credits) return to party of the second part Eighty-five Per Cent (85%) thereof, and retain the remaining Fifteen Per Cent (15%) as rent, or royalty due at each sale or turn in of ores or minerals, provided, however, that the said party of the first part reserves the right and privilege at all times to take said ores or minerals or any part thereof paying the market price thereof, less the above named Fifteen Per Cent (15%) Royalty".

On May 21, 1940, the sub-lease was assigned to the defendant.

3. On April 23, 1920, the successors in title to O. M. Youse sub-leased the remaining portion of the property described in the original lease to O. M. Youse, to the Commerce Mining and Royalty Company. This sub-lease contained the following royalty provision:

> "All checks, drafts, cash or other credits for ores or other minerals sold from this land shall be made payable to the order of the party of the second part, its successors or assigns, who shall at once upon receipt thereof and collections duly made, return to the parties of the first part Five Per Cent (5%) thereof as their rent or royalty and the second party its successors or assigns shall pay to the landlord or land owner another Five Per Cent (5%) of the gross sales as his rent or

royalty, such payment to be made upon collections being made on each sale. That there shall be attached to each royalty payment duplicate sale slips showing date of sale, name of purchaser, and weights thereof, and amounts received. That the remaining Ninety Per Cent (90%) shall belong to the second party."

On March 30, 1939, the sub-lessee assigned this lease to the defendant.

4. On March 30, 1939, defendant acquired from the Commerce Mining & Royalty Company an undivided one-half interest in the fee of the real estate described in Paragraph 1 thereof.

5. On June 9, 1956, Susan D. Barr died leaving plaintiffs as her sole heirs.

6. The real estate here in question is located in what is known as the Tri-State Zinc and Lead Mining District, which in turn is located in the corners of Oklahoma, Kansas, Missouri.

7. In said Tri-State Zinc and Lead Mining District, there are approximately 100 mines or shafts which are or have been operated by approximately 40 different companies, persons or partnerships. The ore bearing rock or crude ore is dynamited from its position approximately 300 feet underground where it is moved through drifts to a shaft and there hoisted to the surface, on the surface the crude ore is moved to a beneficiating or concentrating plant known as a mill. At these mills zinc concentrates and lead conscentrates are recovered from the crude ores so milled.

8. Contained in the zinc concentrates produced as above set forth are zinc, sulphur, cadmium, germanium and other elements.

9. There is no market of any kind for the ore bearing rock or crude ores mined in said mines until said crude ores have been treated at a mill or beneficiating plant and the zinc and lead concentrates recovered therefrom. There is an open market in the Tri-State Zinc and Lead Mining District for the commodities known as zinc concentrates and lead concentrates. Such market has been in continuous existence for a perior of time beginning several years prior to 1912.

10. The sub-lessees named in the sub-leases above describe began operations shortly after the execution of each sub-lease and continued mining operations almost continuously until the defendant acquired the sub-leasehold title by assignment. After acquiring sub-leasehold title, defendant continued mining operations until July of 1958. During said period of time, all of said sub-lessees mined ore bearing rock from the premises, separated therefrom in a nearby mill or concentrating plant, the zinc and lead concentrates contained therein, and accounted to their lessors and to plaintiff's predecessors in title as a full royalty payment, a royalty based upon the value of the zinc and lead concentrates as determined by the market price in effect at all times in the Tri-State District at the time the concentrates were produced. No additional compensation was ever paid to plaintiff's predecessors in title at any time by any of said sub-lessees or by any lessee by reason of the fact that there was contained in

said concentrates so sold, sulphur, cadmium, germanium and other elements, even though these elements were subsequently recovered, in part, in the smelting process at distant smelters. No complaint was ever made by plaintiff's predecessors in title as to this accounting plaintiff's predecessors in title as to this accounting procedure.

11. Mining and milling operations had been conducted in the Tri-State Mining District for many years prior to the time of the execution of the original lease to O. M. Youse. These operations were conducted in substantially the same manner then as they are now, except that the mining and milling operations became more efficient over a period of time. Prior to 1912 the zinc concentrates which were mined and milled in the Tri-State District were shipped to varions smelters outside the Tri-State District for smelting process. At same of these smelters, sulphur was also recovered from the zinc concentrates and sold by the smelters. At all of these smelters zinc metal was recovered by the smelting process.

12. As early as 1935, the defendant and other processors of zinc concentrates began extracting cadmium from residues resulting from the smelting of Tri-State concentrates. Said cadmium was sold commercially to any customer who might be interested in the purchase of the same.

13. As early as 1938 in a laboratory, the defendant had extracted germanium from residues rssulting from the smelting of Tri-State zinc concentrates at its

Henryetta, Oklahoma smelter. In 1941 small quantities of germanium were sold by the defendant to others for experimental purposes. The defendant continued to produce germanium in a laboratory in Joplin, Missouri, through 1953. Beginning in 1954, defendant began producing germanium commercially in its operations at Miami, Oklahoma, and selling same.

14. The defendant began recovering sulphur from Tri-State zinc concentrates at its Galena, Kansas smelter in 1954 and has been selling same commercially since that time.

15. Defendant has never affirmatively advised the plaintiffs or their predecessors in title that it has been and is extracting cadmium, germanium and sulphur in addition to zinc metal as a result of smelting of Tri-State zinc concentrates and the plaintiffs and their predecessors in title have never requested such information. Defendant has openly advised those persons or companies whom it thought might be interested in the purchase or use of cadmium, germanium or sulphur and has advised and advertised generally that it had extracted such substances from the Tri-State zinc concentrates.

16. Prior to the acquisition by assignment of the sub-leasehold title to the property here in question, by the defendant, it was the uniform custom and practice in the Tri-State Mining District and the uniform custom and practice of the companies mining the property in question at all times, to conduct mining and milling operations in substantially the same manner and method as

defendant, to compute the market value at the place mined or produced of said lead, zinc and other minerals or substances in the same manner and based on the same market as has defendant, and to pay a royalty based upon the same method of computation as has defendant. All of the purchasers of the zinc and lead concentrates so produced thereafter shipped these concentrates to smelters outside the Tri-State area, smelted the concentrates and recovered therefrom zinc metal or lead metal, and in some instances, germanium, and in some instances other substances. The total refined products so recovered were in turn sold for more money than that paid for the original unsmeltered concentrates as purchaser on the open market. However, no additional royalty was ever requested by or paid to any of plaintiffs predecessors in title during all of this time or to any of the other land owners in the Tri-State District, based on the value of the products resulting from smelting or other processing.

17. Knowing and relying upon the facts set forth in Paragraph 16, defendant acquired for a valuable consideration the sub-leasehold interest described above, began mining and milling ores from said premises in May of 1940, and has continued since that time with said mining and milling operations, producing the same zinc and lead concentrates as its predecessors and as other mine operators in the Tri-State District. Defendant has paid its sub-lessors and the lessor of said sub-lessors a royalty based upon the market value of all zinc and lead concentrates so produced and removed by it. A portion of said zinc and lead concentrates mined and

milled by the defendant were sold on the open market and were subsequently shipped and smelted by the purchasers thereof in exactly the same way as in the past so that zinc metal, lead metal, sulphur, germanium, cadmium and other substances were recovered and sold for more money than that paid by the purchaser for the zinc and lead concentrates. The remaining portion of the zinc and lead concentrates were shipped by defendant to its Henryetta, Oklahoma smelter, and smeltered in the same way as other processors. As was the custom in the past and as is the custom in the Tri-State Mining District, no additional royalty was paid lessors for the values added as a result of smelting and additional treatment.

CONCLUSIONS OF LAW

The Court concludes as a matter of law:

1. The plaintiffs have been paid all of the royalty due them pursuant to the terms of the mining lease executed by their predecesors in title on July 5, 1912.

2. The plaintiffs are estopped to assert that they have not been paid royalties due them because defendant acquired its sub-leasehold title relying to its detriment upon the uniform interpretation of the July 5, 1912 lease made by the acts and conduct of plaintiffs predecessors in title and other operations under said lease.

3. The contract or lease under which plaintiffs seek to recover is between plaintiffs predecessors in title and O. M. Youse and his successors in title. Defendant is not a successor in title to O. M. Youse. Thus, there is no privity of contract between plaintiffs and defendant and hence no basis for recovery.

4. There is no fiduciary relationship between plaintiffs and defendant.

APPENDIX B.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT.

September Term—1961

Filed United States Court of Appeals, Tenth Circuit Oct. 13, 1961. Robert B. Cartwright, Clerk.

No. 6736

Myra Haynes, Pearl Garrett, Beatrice Thompson and Glenn Barr, Appellants,

vs.

The Eagle-Picher Company, a corporation, Appellee.

Appeal from the United States District Court for the District of Kansas.

Douglas Hudson for Appellants.

John R. Wallace for Appellee.

Before Murrah, Chief Judge, and Phillips and Huxman, Circuit Judges.

Murrah, Chief Judge.

This is an appeal from a judgment of the trial court denying recovery of additional royalty allegedly due the plaintiff-appellants under a mining lease.

Plaintiffs are the present owners of an undivided one-half interest in a quarter section of land in Kansas. In 1912 the predecessor of the plaintiffs executed a lease

to O. M. Youse for a primary term of ten (10) years which provided, *inter alia*, that "the privilege of operating shall continue as long as oil, minerals, or other substances of value can be produced in paying quantities." The material portion of the royalty clause of this lease provided:

> "In consideration of which the said party of the second part hereby agree and bind himself, his executors, administrators, or assigns, or sublessees to pay or cause to be paid to the party of the first part their executors, administrators or assigns, at a sum of money equal to five (5) percentum of the market value at the place mined or produced of all oil, gas, asphaltum, lead, zinc and all other minerals or substances whatever, which may be mined or removed by the said party of the second part * * *."

By mesne conveyances (hereinafter more fully set out) defendant Eagle-Picher obtained the right to mine these premises, located in what is known as the Tri-State Mining District. The mining operations consist of bringing the ore bearing rock to the surface where it is run through a beneficiating or concentrating plant or mill, and zinc concentrates and lead concentrates are recovered from the crude ore. Contained in the concentrates are zinc, sulphur, lead, cadmium, germanium and other elements.

There is no market of any kind for the ore bearing rock or crude ores mined until they have been reduced to concentrates. There is an open market in the Tri-State Mining District for the commodities known as zinc and lead concentrates. Such market has been in continuous

existence for a period of time beginning several years prior to the original lease.

A royalty, based upon the market value of the zinc and lead concentrates, as determined by the market price, was paid by Eagle-Picher and its predecessors to the plaintiffs and their predecessors as full royalty payment.

Subsequent to plaintiffs' acquisition of their interest, Eagle-Picher, utilizing advanced processing techniques, began saving commercially sulphur, cadmium and germanium out of the residue of the concentrates. no royalty was paid on these newly discovered mineral values. Plaintiffs, upon learning that minerals other than lead and zinc were being commercially saved from the ores taken from their property, demanded payment for the sulphur, cadmium and germanium under the royalty provisions of the original lease. Eagle-Picher refused to recognize any obligation under the contract to pay for these mineral substances. This suit involves the lessee's obligation under the royalty provision of the original lease to compensate the lessors for these newly found values.

The trial court held for Eagle-Picher and concluded: that plaintiffs have been paid all that was due them under the original lease; that plaintiffs are estopped from asserting that they have not been paid all royalties due them; that there is no privity of contract between plaintiffs and defendant, hence no basis for recovery; and, that there is no fiduciary relationship between plaintiffs and defendant.

Of course, if there is no privity between plaintiffs and Eagle-Picher, the case is at an end. A brief deraignment of the manner by which Eagle-Picher acquired it's interest in the premises is essential to an understanding of the legal relationship of the parties.

An undivided one-half interest in the entire Youse lease was obtained by Eagle-Picher from the Commerce Mining and Royalty Company, who had held that interest as assignee of the original lessee.

The remaining undivided one-half interest in the leasehold estate is held by Eagle-Picher under two instruments, each of which cover an undivided one-half interest in a divisible portion of the quarter section. Each of these instruments had a primary term which expired prior to that of the original lease and each of which provided, as did the original lease, that if production was being had in paying quantities on the terminal date of their primary terms, then the right to operate thereunder would continue so long as such production was maintained.[1]

Eagle-Picher takes the position that as to the undivided one-half interest which it obtained under the

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1. The habendum clause of one of the instruments used the same language employed in the original lease, while the habendum clause of the other instrument provided that the lessee agreed with his sub-tenant to "extend such lease so long as the terms thereof are fully complied with for any period of time first parties may have authority to so grant." The "authority to so grant" on the part of the lessee was derived from the original lease and was for so long as minerals or other substances were produced in paying quantities.

instruments relating to the divisible tracts it is a sub-lessee—hence without privity, and under no duty to account to the lessor. Plaintiffs urge the provisions of the original lease wherein the lessee bound "himself, his executors, administrators, or assigns, or sub-lessees" to pay the royalty reserved therein and argue that Eagle-Picher, even if a sub-lessee, is responsible under the terms of the original lease.

A sub-lessee owes no obligation to the original lessor to comply with the covenants of the original lease because there is no privity—either of contract or estate—between them. See: Tiffany, Law of Real Property, Vol. I, p. 201, Sec. 124; 32 Am. Jur. 342, Landlord and Tenant, Sec. 423; Thompson on Real Property, 1959 Replacement, p. 52, Sec. 1210; 52 C. J. S. 341, Landlord and Tenant, Sec. 529 b (1). It follows that the language of the original lease, purporting to bind any subsequent sub-lessees, did not and could not have that effect.

It is well settled that a conveyance by a lessee of an estate less than his own, retaining a reversion, is a sub-lease, while a conveyance which operates to transfer the entire interest of the lessee is an assignment. See: Tiffany, Law of Real Property, pp. 196-197, Sec. 123; 32 Am. Jur. 331, Landlord and Tenant, Sec. 392. The instruments relating to the divisible portions of the quarter section here in question were for primary terms expiring prior to that of the original lease and reversionary interests were retained by the lessee-transferor. The primary terms of these instuments

therefore conveyed sub-leasehold estates. (However, the reversionary interests were, by the terms of the instruments, contingent upon the absence of production in paying quantities on the last day of their primary terms.) The record shows that on such dates production was being had in paying quantities and the habendum clauses contained in the instruments became effective and operated to continue the right of the parties holding under such instruments to occupy and mine the premises so long as such production was maintained. The contingent reversionary interests which had been retained by the lessee were thereby extinguished and, from and after that time, the transferees of the lessee held the entire remaining interest of the lessee under the terms of the original lease, *i. e.*, an estate whose duration was so long as minerals in paying quantities could be recovered.

Having thereby acquired all of the remaining estate of the lessee, privity of estate between the lessor and these transferees was complete and the parties holding under such instruments became, in fact and law, assignees. See: Tiffany, Law of Real Property, Vol. I, pp. 196, 197, Sec. 123; 32 Am. Jur. 289, Landlord and Tenant, Sec. 313. When, subsequently, Eagle-Picher obtained the interests owned by these transferees, it replaced them as assignee under the original lease and thereupon acquired an estate in privity with the lessor-landowner as to the remaining undivided one-half of the Youse lease.

The net result of Eagle-Picher's acquisition of all of the interest by which it became the sole operator of

the premises was to place it in the position of an assignee of the entire Youse lease with the obligation to comply with the royalty provisions contained therein. Indeed, Eagle-Picher, as did its predecessors, has at all times paid directly to the lessor-landowners a royalty at the rate and in the manner provided for in the original lease.

Eagle-Picher additionally contends that the undivided one-half interest in the original lease obtained by it from the Commerce Mining and Royalty Company merged with the undivided one-half interest in the fee which it later acquired. The short answer is that it is the one-half of the lessor's interest presently owned by the plaintiffs and not that which is owned by Eagle-Picher which is in controversy.

Having determined Eagle-Picher's duty to comply with the terms of the original lease, we turn to the interpretation of the covenants contained therein, and particularly those words which obligate the lessees to pay five per cent "of the market value at the place mined or produced of all oil, gas, asphaltum, lead, zinc and all other minerals or substances whatever, which may be mined or removed." Given a reasonable construction, we think this rather conventional language was intended to obligate the lessees to pay the lessors a five per cent royalty on all minerals produced and sold. It is undisputed that sulphur, cadmium and germanium are minerals and, while they may not have had any value at the place "mined", they had a very definite value at the place "produced" after having been mined

and removed. The disjunctive reference to the term "produced" in the lease admits, we think, of no other interpretation than that the parties contemplated the possibility that the production of minerals might well be accomplished at places and times other than those of the actual mining operations. It is common knowledge that minerals are not separated from the earth in pure form and that, except in rare instances, some processing is necessary to render them marketable. Indeed, it is admitted in our case that processing, to the extent of reducing the crude ore to concentrate form, has always been necessary before any market value at all is attained. The market value so attained was based entirely on the zinc and lead content of the concentrates and the payment of royalty out of the proceeds of the sale of these concentrates did not compensate the landowner for the additional minerals they contained. When further processing resulted in the saving of sulphur, cadmium and germanium from the residue of the concentrates, these minerals acquired a market value of their own. The conclusion must follow, we think, that having been "produced"[1] and having acquired an ascertainable value, the sulphur, cadmium and germanium were covered by the terms of the lease.

Eagle-Picher urges that the interpretation of the lease should conform to the custom and practice which

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1. The evidence showed that "(I)n the mining business when you say you produce something, that means you save it commercially."

existed for many years in the Tri-State Mining Area of paying royalties only on the market value of the concentrates. Of course, the royaltiy provision of the lease in question is, in our view, clear and unambiguous and may not be changed or modified by proof of general custom. Even so, the custom and practice relied upon by Eagle-Picher does not supply a convincing reason for the interpretation it desires. The record shows that with the advent of commercial value in the cadmium, germanium and sulphur content of the ore, the mining leases issued in the Tri-State area contained in almost all instances, language specifically limiting the royalty obligation to a percent of the lead and zinc concentrate value. Prior to the change in these leases, the "concentrates" were the only product mined which had any "market value" and, therefore, while royalty payments based thereon fully satisfied the provisions of our lease under the conditions then existing, that practice did not eliminate the possibility—now a reality—that other "minerals or substances * * * mined or removed" would later acquuire a "market value" and thereby be cognizable under the plain terms of the lease.

As to the trial court's conclusion that plaintiffs are estopped to assert their claim, an examination of the record shows that the evidence wholly fails to establish any knowledge of the essential facts on the part of the plaintiffs and their predecessors in interest necessary to establish this defense. See: 19 Am. Jur. 634, Estoppel, Sec. 34; *Chisholm v. House*, (10 Cir.) 183 F. 2d 698.

For the reasons indicated, the judgment is reversed with instructions to enter judgment for the plaintiffs for the amount of royalties, upon proof thereof, remaining due to the plaintiffs under the views herein expressed.